No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, et al.,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, LIVINGWELL MEDICAL CLINIC, INC., PREGNANCY CARE CENTER OF THE NORTH COAST, INC., AND CONFIDENCE PREGNANCY CENTER, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Center for Law & Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

The ACLJ represents three California pro-life, licensed medical centers (*amici* here) that are subject to one of the two compelled-speech provisions challenged in this case: LivingWell Medical Clinic, Inc. ("LivingWell"), Pregnancy Care Center of the North Coast, Inc. ("PCC"), and Confidence Pregnancy Center, Inc. ("CPC"). These centers are the petitioners in *LivingWell Medical Center, Inc. v. Becerra*, U.S. No. 16-1153. That petition for certiorari is pending before this Court.

Amicus LivingWell, located in Grass Valley, California, is a non-profit corporation, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of LivingWell is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners' blanket consent to *amicus* briefs is on file with this Court and Respondents have consented to the filing of this brief.

LivingWell's services include pregnancy options education and consultation; pregnancy testing and verification; limited obstetrical ultrasounds; STI/STD testing, education, and treatment; past abortion healing retreats; community education presentations; and material support. And since pregnancy may directly or indirectly affect others, LivingWell's services extend to partners and family members as well. LivingWell personnel provide support both during and after pregnancy, helping to ensure the comfort of all who are involved.

Based on its religious tenets and principles, LivingWell has never referred a client for abortion, nor will it ever do so. LivingWell discloses verbally that it does not perform or refer for abortion services during any phone inquiry, as well as on the "Services Provided" document that clients sign before any services are offered.

Amicus PCC is a California non-profit corporation that owns and operates a clinic, J. Rophe Medical, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of Pregnancy Care Center is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission.

PCC, which is morally and religiously opposed to abortion, encourages, through education and outreach, the recognition of human life from the moment of conception. It ministers in the name of Jesus Christ to women and men facing unplanned pregnancies by providing support and medical services to them that will empower them to make healthy life choices.

Like LivingWell, PCC never charges fees or asks its clients for donations. And, also like LivingWell, based on its religious beliefs and mission, PCC does not, and will not, encourage, facilitate, or refer for abortions.

Amicus CPC, located in Salinas, California, is a California non-profit corporation, licensed by the California Department of Public Health as a Community Clinic. The mission and purpose of CPC are similar to those of the other *amici* centers: to help women deal with unplanned pregnancies by offering, free of charge, a variety of educational, medical, and material resources, including ultrasounds, counseling and emotional support, and maternity and baby items. CPC also opposes abortion and will not refer for, recommend, encourage or facilitate the provision of abortions.[2]

SUMMARY OF ARGUMENT AND INTRODUCTION

Few statements of this Court are more esteemed than Justice Jackson's words in *W. Va. State Bd. of Educ. v. Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

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[2] This brief is also being submitted on behalf of more than 255,000 individuals who joined the ACLJ's Committee to Defend Pro-Life Speech and Save Lives.

319 U.S. 624, 642 (1943). Governmental compulsion of private speech on matters of public concern is repugnant to any principled understanding of human dignity, let alone the First Amendment. When the state coerces one to speak words with which he does not agree, or obliges one to utter speech that contradicts his values and beliefs, it impermissibly encroaches on that person's very autonomy. Truly, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637); *see also Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech, and religion.").

The law at issue in this case, California's Reproductive FACT Act, 2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 *et seq.* ("the Act"), has nothing to do with the regulation of a medical procedure. It is not designed to ensure that a person gives full and informed consent to a medical operation. Its purpose is not to guarantee that advertisements relating to pregnancy services are truthful or not misleading.

Rather, the law at issue in this case is the State of California's unabashed attempt to coerce pro-life pregnancy centers, such as *amici*, into communicating a message that radically undermines the nature of who they are and what they do. It forces them to advertise the free or low-cost availability of abortion—a procedure they do not provide and to which they

morally and religiously object. While the State is free to advertise its own abortion-related programs, using its own or purchased media, it has no constitutional authority to dragoon dissenting voices into disseminating the State's message.

Consistently and correctly, this Court has held that the First Amendment does not countenance state efforts to compel one to act as a ventriloquist's dummy for a government-dictated message. *See, e.g., Barnette*; *Wooley*. It has struck down efforts by the government to force unwilling speakers to act as couriers for a third party's message. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating statute requiring newspaper to print reply of candidate for public office whose character was the subject of criticism in published editorials); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 16 (1986) (plurality) (invalidating statute compelling a regulated utility company to distribute political information that it opposes to its consumers, as a condition of conveying its own political views to them). It has held that the free speech rights of professional fundraisers were violated by a law compelling statements of fact relating to the percentage of contributions used for charitable purposes. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

Like these laws the Court has struck down as offensive to the right of free speech, the FACT Act cannot survive judicial scrutiny. It is, on its face, a content-based compulsion of speech that requires the speaker to publicize and propagate the viewpoint of the government on a subject of enormous and ongoing controversy. Such laws trigger the most exacting level

of judicial scrutiny, and there can be no question that the Act fails that standard.

The Reproductive FACT Act's requirement that non-profit, pro-life pregnancy resource centers advertise free or low-cost abortions is unconstitutional.

ARGUMENT

I. The Act is an Impermissible Content and Viewpoint-Based Compulsion of Speech on a Matter of Public Concern.

The Act requires *amici*, *i.e.*, non-profit, pro-life medical facilities that offer alternatives to abortion, to disseminate the following message to all clients, no matter the reason for their visit:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

§ 123472(a)(1).[3]

The Act not only dictates precisely what the centers must say, it tells them exactly how they must say it. The State's message must be communicated in one of three ways: (1) posted on the wall of a waiting room for all to see; (2) in a printed notice distributed to all clients; or (3) through "a digital notice distributed to all

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[3] Unless otherwise indicated, statutory references are to the California Health & Safety Code.

clients that can be read at the time of check-in or arrival." § 123472(a)(2).[4]

A simple examination of ***who*** must speak the Act's message (pro-life centers morally and religiously opposed to abortion); ***what*** they must say (advertising and facilitating access to a procedure that they do not provide and find morally repugnant); ***how*** they must say it (at the very outset of any communication, prior to their own speech), and ***to whom*** they must say it (all potential and actual clients, no matter the reason for their visit), yields only one conclusion: the Act is an impermissible content and viewpoint-based compulsion of speech.

A. *Who* Must Speak the State's Message

It is axiomatic that the government may not "'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (citation omitted); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction."). The Act, which targets pro-life pregnancy centers to speak the State's message, violates that fundamental principle.

The Act does not apply to all California licensed professionals who provide pregnancy-related services to clients. In fact, the Act does not apply to medical

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[4] Unlicensed facilities must also disseminate a message crafted by the government. § 123472(b)(1). While *amici* believe this requirement is unconstitutional, this brief only addresses the speech that must be spoken by non-exempt "licensed covered facilities," such as *amici*.

professionals at all. Nor does the Act even apply to all facilities that provide pregnancy-related services. The Act only applies to entities that meet the definition of a "licensed covered facility," as set forth in the Act,[5] and are not exempt from its coverage. Exempt from the Act's coverage, and thus excused from complying with its speech mandate, are (1) clinics operated by the United States government, and (2) a "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program [FPACT]." § 123471(c).

The latter exemption discloses the true target of the Act: pro-life pregnancy centers. Abortion is a covered benefit under Medi-Cal,[6] and FPACT "covers all FDA-approved contraceptive methods, fertility awareness methods and, sterilization procedures."[7] FPACT-

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[5] The Act defines a "licensed covered facility" as "a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients." § 123471(a).

[6] *See* "Abortions," https://files.medi-cal.ca.gov/pubsdoco/hipaa/icd9_policy_holding_library/part2/abort_m00o03.pdf.

[7] *See* FPACT "Program Standards," http://files.medi-cal.ca.gov/pubsdoco/publications/masters-mtp/fpact/progstand_f00.doc.

enrolled clinics must "provide the full range of services covered in the program" and must be "in good standing with Medi-Cal."[8] While many FDA-approved methods of contraception work by preventing conception, "four of those methods . . . may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762-63 (2014). Thus, pro-life pregnancy centers, such as *amici*, that do not, or would not, prescribe FDA-approved drugs with an abortifacient mechanism of action for moral or religious reasons cannot, by definition, be an FPACT provider. They must therefore speak the State's message, while those that agree to the terms of being a Medi-Cal and FPACT provider, such as the nation's largest abortion provider, Planned Parenthood, need not alter their expression in the manner mandated by the Act.[9]

The mission and activities of a co-sponsor of the Act, the National Abortion and Reproductive Rights Action League ("NARAL"), further reveals the true target of the Act.[10] NARAL has been a longtime political

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[8] *See* "Provider Enrollment," http://www.familypact.org/Providers/prov-enrollment.

[9] Planned Parenthood, which has described itself as "one of the largest provider of reproductive health services in the country," *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 837 (N.D. Cal. 2016), does not have to comply with the Act's speech mandate because it is a Medi-Cal and FPACT provider. *See Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1113-14 (9th Cir. 2014).

[10] NARAL is specifically identified as a co-sponsor of the Act in the legislative record. *See* J.A. at 56.

adversary of "crisis pregnancy centers."[11] For years, it has vigorously advocated for legislation designed precisely to hamper the efforts of pro-life pregnancy care centers that counsel and care for women according to their moral, religious, political, and social viewpoints.

It did so in Baltimore, where that city's ordinance compelling the speech of pro-life pregnancy centers was based, in large part, on a report of NARAL Pro-Choice Maryland.[12] That ordinance has been struck down. *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council of Balt.*, No. 16-2325, 2018 U.S. App. LEXIS 297 (4th Cir. Jan. 5, 2018).

It did so in Montgomery County, Maryland, where the county council relied heavily upon the same NARAL Pro-Choice Maryland report and statements from NARAL Pro-Choice Maryland staff in enacting a resolution requiring "Limited Service Pregnancy Resource Centers" to make certain disclosures.[13] That ordinance has also been struck down. *See Centro Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d. 745 (D. Md. 2014).

It did so, again, in Austin, Texas, where a summit held in Denver in the fall of 2009—sponsored by

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[11] "The Truth about Crisis Pregnancy Centers," NARAL Pro-Choice America, https://www.prochoiceamerica.org/report/truth-crisis-pregnancy-centers.

[12] *See* NARAL Pro-Choice Maryland Fund, *The Truth Revealed: Maryland Crisis Pregnancy Center Investigations* (2008).

[13] See Memorandum of Amanda Mihill, Legislative Analyst to County Council, Jan. 29, 2010, at 2, *Centro Tepeyac v. Montgomery Cnty.*, No. 10-1259 (D. Md. May 19, 2010), ECF No. 1-4.

NARAL Pro-Choice New York and its affiliate, The National Institute for Reproductive Health—was highly influential in the passage of an ordinance compelling the speech of "Unlicensed Pregnancy Service Centers."[14] That ordinance was struck down as unconstitutionally vague. *See Austin Lifecare, Inc. v. City of Austin*, No. 1:11-cv-00875-LY, ECF No. 145 (W.D. Tex. June 24, 2014).

It also did so in New York City, where, in passing a compelled speech ordinance for "pregnancy services centers," the city council relied heavily upon a report issued by NARAL Pro-Choice New York, which was modeled on the Maryland NARAL report and criticized all aspects of the work of pro-life centers.[15] Christine Quinn, Speaker of the New York City Council, said, "The NARAL Pro-Choice New York report was more

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[14] NARAL Pro-Choice NY, Exposing Crisis Pregnancy Centers One City at a Time, http://www.youtube.com/watch?v= Tpya05pQGAQ, at 2:45 to 3:10 (last visited May 20, 2011) (statement of Sara Cleveland, Executive Director, NARAL Pro-Choice Texas) ("At the time of the summit, Baltimore was already in the process of introducing the disclosure ordinance for crisis pregnancy centers. From that idea, our contact with the City of Austin and the political director for NARAL had the realization that this is an ordinance that could probably work in Austin as well."); *id.* at 3:10 to 3:46 (statement of Heidi Gerbracht, Policy Director, Councilmember Spelman's Office) ("The conversation at the Denver Urban Initiative was fundamental to us getting our crisis pregnancy center ordinance started and then passed.").

[15] NARAL Pro-Choice New York and the National Institute for Reproductive Health, *She Said Abortion Could Cause Breast Cancer: A Report on the Lies, Manipulations, and Privacy Violations of Crisis Pregnancy Centers in New York City* (2010), at 21.

than helpful. It was critical."[16] Four of the five compelled disclosures of that ordinance have been struck down. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014).[17]

And NARAL has done so here, where it "partnered with [its] California chapter *to craft language*, organize more than 40 partners and allies, and mobilize thousands of activists to pass critical policy—the Reproductive FACT Act." IRS Form 990, NARAL Pro-Choice America Foundation (2014), at 2 (emphasis added).[18]

In fact, the target of the Act, co-sponsored and crafted, at least in part, by NARAL, is specifically identified in the Act's legislative record: "crisis pregnancy centers" in California that "aim to discourage and [*allegedly*] prevent women from seeking abortions." J.A. at 39.

Finally, the implementation of the Act places beyond doubt that pro-life centers, such as *amici*, are the principal targets of the legislation. Of the 1,379 primary clinics licensed under Section 1204 of the California Health and Safety Code, *only 67* of those clinics are required to disseminate the Act's message, and *all*, but one, of those 67 centers are *pro-life*

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[16] NARAL NY Video, *supra*, at n.14, at 4:56 to 5:08.

[17] The Second Circuit referred to three of those disclosures (relating to abortion, emergency contraception, and prenatal care) collectively as the "Services Disclosure." *Evergreen*, 740 F.3d at 238.

[18] *Available at* http://990s.foundationcenter.org/990_pdf_ archive/ 521/ 521100361/521100361_201509_990.pdf.

organizations. *See* Amicus Brief of The Scharpen Foundation, Inc.

As in *Sorrell*, "[t]he legislature designed [the Act] to target [disfavored] speakers and their messages for disfavored treatment." 564 U.S. at 565. The Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* (quotation marks and citation omitted). For this reason alone, *i.e.*, even without considering what specifically the pro-life centers must say, the Act is constitutionally invalid.

B. *What* Pro-Life Centers Must Say

The Act does not just target pro-life centers for regulation, it tells them what they must say, on a topic, no less, of enormous controversy and public concern. Such compulsion of speech conflicts with a core canon of this Court's free speech jurisprudence: the "basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted); *see also Hurley v. Irish-American GLB Grp.*, 515 U.S. 557, 573 (1995) ("[A] speaker has the autonomy to choose the content of his own message.").

As an initial matter, the subject matter of the mandated notice is no innocuous topic. It forcibly inserts into *amici*'s speech the subject of abortion, one of the most—if not *the most*—politically, socially, and religiously charged issues of our day. *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) ("We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the

death of an innocent child"); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.").

The Act thereby commands *amici* to address a subject of obvious public concern. *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'") (citation omitted). That, of course, is not without critical constitutional significance. Speech that relates to matters of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.*

But the Act does more than force *amici* to *address* abortion; it requires them to affirmatively *advertise* and thereby *facilitate* it. Indeed, the Act does not require *amici* to inform their clients of what goods and services *they provide*. Rather, the Act requires them to tell their clients about particularly controversial services *the State provides*, *i.e.*, "public programs that provide immediate free or low-cost access to . . . abortion for eligible women." § 123472(a)(1). And because the State does not itself perform abortions, but reimburses abortion providers, such as Planned Parenthood, to perform them (depending on a woman's eligibility), the Act is not just an advertisement of state family planning programs, it is an advertisement for services that *abortionists provide*.

If a forced subsidy for the "generic advertising" of mushrooms—a matter "of interest to but a small segment of the population"—is impermissible under the First Amendment, *see United States v. United Foods*, 533 U.S. 405, 410 (2001), then so is the Act, under which pro-life centers are compelled to act as direct vehicles for the State's advertisement of its abortion-subsidizing programs. And if a law requiring fundraisers for charities to disclose facts and figures related to their own operation—namely, to tell solicited persons what percentage of contributions actually went to those charities—violates the First Amendment, *see Riley*, so too does the Act, which requires pro-life centers to advertise a service they do not provide and to which they strenuously object on moral and religious grounds.

It is one thing to prohibit a speaker from speaking his mind. It is another thing to require a speaker to subsidize the speech of another. But, even worse than these two, is to compel a speaker *to use his own voice* to speak an objectionable message dictated by another. For *amici*, who do not provide abortions, refer for abortions, and are morally and religiously opposed to abortion, being required to steer their clients toward abortion, per the Act, contradicts the very reason for their existence.

It is therefore erroneous to suggest, as did the lower court, that the Act involves nothing more than a mere recitation of fact, *i.e.*, informing persons of the existence of government programs (though, under *Riley*, that too would be unconstitutional). *See NIFLA v. Harris*, 839 F.3d 823, 836 (9th 2016) ("[T]he Act does not convey any opinion. . . . [T]he Licensed Notice

merely states the existence of publicly-funded family-planning services."). The utterance of a fact can be just as charged with moral and religious significance as sharing an opinion. The homeowner asked by a Gestapo officer whether he is housing any Jews understands this. A priest refusing to disclose what was said to him in the confessional realizes it. Here, a faith-based, pro-life pregnancy center forced to tell a client that she might be eligible for a free abortion, and compelled to provide a phone number that may aid that client to obtain such an abortion, knows that that message involves far more than the disclosure of mere fact.

Indeed, this Court has repeatedly stated that any distinction between "compelled statements of opinion" and "compelled statements of 'fact'" is *irrelevant* since "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797-98; *see also Hurley*, 515 U.S. at 573-74 (citation omitted) ("[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

Nor is it relevant that the notice does not use the word "encourage," or any other word of overt persuasion. *See NIFLA*, 839 F.3d at 842 (emphasizing that "the Licensed Notice does not use the word 'encourage'"). A government regulation requiring gas stations to inform their customers that they might be eligible for free or low-cost fuel elsewhere would not need to say anything further to encourage customers to pursue this offer. A mortgage company advertising its refinancing services with the words, "our customers

save an average $132 per month, call us to find out if you are eligible," would not have to include any further words of encouragement. In such circumstances, the statement of facts is itself the invitation.

Underlying the purported factual nature of the Act's compelled notice is the State's viewpoint that abortion can be a benefit[19] to, and positive good for, women—a viewpoint that pro-life centers do not share and cannot disseminate without violating their own moral and religious commitments. In fact, as stated in the legislative record, the Act is designed to advance California's "proud legacy of respecting reproductive freedom" and its "forward-thinking" programs that provide "reproductive health assistance to low income women." J.A. at 38-39. While California is free to have its own viewpoints on abortion—just as a state may also "make a value judgment favoring childbirth over abortion," and decline to fund abortion, *Maher v. Roe*, 432 U.S. 464, 474 (1977)—advancing that viewpoint through legislative action (outside the context, for example, of ensuring informed consent) is circumscribed by, at a minimum, the First Amendment. *See, e.g.*, *Agency for Int'l Dev.* (enjoining on First Amendment grounds a provision of a federal law that required participating organizations to adopt a policy explicitly opposing prostitution).

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[19] While it is commonplace among abortion supporters to assert that abortion is safer than childbirth, this assertion rests upon specious comparisons of noncomparable databases. In fact, it appears from the evidence that abortion is most definitely not safer than childbirth. *See generally* Amicus Brief of American Center for Law & Justice *et al.*, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (Feb. 2, 2016). In any event, this misuse of statistics does not address the religious, moral, or psychological impacts of abortion.

Here, mandating that pro-life centers facilitate the State's "forward-thinking" ideology, by means of an advertisement for a service they do not provide, unlawfully commandeers *amici* into speaking a message contrary to their identities and viewpoints. That cannot possibly be constitutional. *See Wooley*, 430 U.S. at 717 ("[W]here the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

In sum, even if the Act imposed its speech mandate on *all* licensed clinics involved in pregnancy-related services, it would still be void on account of the content and viewpoint of the message that must be disseminated. California "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

C. *To Whom*, and *How*, Pro-Life Centers Must Speak

"The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-91. Not according to the State of California. The Act does not allow *amici* to exercise their own judgment, based on the individual needs of a client, how, or whether, to inform clients of the State's "family planning" programs. *See Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1341 (2010) (federal disclosure law governing debt relief agencies gave "flexibility to tailor the disclosures to its individual

circumstances"). The Act requires centers to advertise to *all clients*, speaking the *exact words* and in the *exact manner* dictated by the Act, the existence of those programs. Thus, a new mother seeking diapers for her newborn must be told about the State's public funding of abortion; a woman facing coercion to abort her child and seeking support to carry her child to term must be directed to a telephone number where she can find out if she qualifies for a free abortion; a teenage mother only seeking advice on how to nurse a baby must also be told these things.

Substituting "its judgment as to how best to speak for that of speakers and listeners" is precisely what the State has done in this case. *Riley*, 487 U.S. at 791. Instead of allowing *amici* to speak to their clients according to, and consistent with, their own principles, raising the issue of abortion—*if at all*—with a client at a time they think best, the State imposes its message *at the very beginning of a center's contact with every potential client*. In so doing, the Act clouds everything *amici* say to a client thereafter with the State's preferred message. Even worse, the State's advertisement has the prospect of driving a potential client out the door before the center can say a word, let alone engage in any meaningful discussion with that person. *Cf. id.* at 800 ("[I]f the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.").

The Act therefore operates both *indiscriminately* (to all potential clients, whatever their needs might be) and *prophylactically* (before the center can say

anything to a client about his or her individual needs). But "prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button* 371 U.S. 415, 438 (1963) (citations omitted).

The State emphasized in the court below that nothing in the Act would prohibit *amici* from supplementing the mandated speech with its own speech. But supplementing compelled speech with one's own speech does not cure the coercion. It would not have availed the State of New Hampshire in *Wooley* to argue that the Maynards could have placed bumper stickers on their car objecting to being compelled to display the motto, "Live Free or Die," on their license plate. It would not have helped the State of California in *Pac. Gas & Elec. Co.* to argue that the utility company could have included additional information in its newsletters. The decision in *Barnette* would have been the same even if West Virginia allowed students to cross their fingers or take a knee as an expression of their disapproval while being compelled to recite the Pledge.

A law that "forces speakers to alter their speech to conform with an agenda they do not set" is unconstitutional even if that law does not restrict other speech on that same topic, or even if the speaker is permitted to contradict himself. *Pac. Gas & Elec. Co.*, 475 U.S. at 9. Cognitive dissonance is no cure for compelled speech.

The Act compels speech in an impermissibly broad and indiscriminate fashion to further the State's

message while, at the same time, undermining the message of pro-life pregnancy centers.

II. The Act Does Not Regulate Professional Speech.

The State will argue, as it argued in the courts below, that the Act is a permissible regulation of "professional speech," subject to only a moderate level of scrutiny. The Court should reject any such contention. This Court has not formally articulated a "professional speech doctrine," and there is no need for it to do so here, since the Act does not regulate any reasonable understanding of "professional speech."

First, the Act's compelled speech requirement does not apply to a *professional*. A professional is "[s]omeone who belongs to a learned profession or whose occupation requires a high level of training and proficiency." Black's Law Dictionary, 1403 (10th ed. 2009). Professionals are typically individuals licensed by the state to practice a particular profession. *See, e.g., Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (lawyers); *Edenfield v. Fane*, 507 U.S. 761 (1993) (accountants); *Riley* (fundraising professionals).

The Act, however, does not impose any speech requirements on licensed *professionals*; it only imposes speech requirements on licensed *facilities*. Indeed, the Act's legislative history makes no mention of licensed professionals failing in their professional duties, creating the need to regulate their professional speech. Instead, it is clear that the target of the Act is the "nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California." J.A. at 39. Indeed, no professional who works for, or

volunteers at, a licensed facility governed by the Act will face civil penalties under that statute for failing to utter the State's message.

Moreover, even if a professional speech doctrine could be applied to licensed *entities*, as opposed to licensed *professionals*, the nature of the speech at issue here, and the context in which that speech must be spoken, cannot be categorized as professional.

According to Justice White's concurrence in *Lowe v. SEC*, the *fons et origo* of the so-called professional speech doctrine:

> [T]he principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech per se. . . . *At some point, a measure is no longer a regulation of a profession but a regulation of speech.*

472 U.S. 181, 229-30 (1985) (White, J., concurring in result) (emphasis added).

Professional speech arises when a speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Id.* at 232. But the prophylactic nature of the speech compelled by the Act, indiscriminately spoken to all clients no matter their needs and before the circumstances of any particular individual can be discovered, precludes any suggestion that the Act regulates professional speech.

> Where the personal nexus between professional and client *does not exist*, and a speaker *does not*

> *purport* to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; *it becomes regulation of speaking or publishing as such*. . .

Id. at 232 (emphasis added).

That is the case here, where the Act compels speech without regard to "the client's individual needs and circumstances"; whether there is any "personal nexus between professional and client"; and without any regard to the circumstances of any one individual. Accordingly, the Act is not the regulation of a professional/client relationship, but the regulation (in fact, *compulsion*) of speech *as such*.

The outcome in *Wooley v. Maynard* would not have been different if New Hampshire had limited its requirement to display "Live Free or Die" to the waiting rooms of offices of state-licensed civil liberties attorneys. *Cf. Fla. Bar*, 515 U.S. at 634 ("[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by [professionals] the strongest protection our Constitution has to offer."). Similarly, the State of California should not be permitted to coerce the speech of dissenting voices on a subject of public concern under the guise of regulating "professional speech." The "State cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429.

III. The Act is Unrelated to Ensuring Informed Consent.

This Court's observation in *Casey*, that "the physician's First Amendment rights not to speak" in that particular case were "implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," is beside the point here. 505 U.S. at 884. Pennsylvania's mandated disclosures, including information regarding "the assistance available should [the woman] decide to carry the pregnancy to full term," were *specifically* related to an *individual* client contemplating a *particular choice*, *i.e.*, abortion. *Id.* at 883. They were designed to ensure an informed choice about the procedure the woman was to undergo. *Id.* This Court upheld the disclosures because they provided "truthful, nonmisleading information *about the nature of the procedure*." *Id.* at 882 (emphasis added).

As previously discussed, however, and unlike the disclosures upheld in *Casey*, the Act compels speech in a wholly indiscriminate and prophylactic fashion: to all potential clients, no matter the reason for their visit, and regardless of whether the compelled speaker provides the procedure at issue. A generic advertisement for a government-sponsored program has nothing to do with ensuring informed consent. A mother visiting one of the *amici* centers for baby clothes, but who is not told about California's abortion-funding program, will not "discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882.

Indeed, there is a profound factual and legal difference between (1) a law requiring professionals to inform patients of all the risks associated with *a proposed medical procedure* in order to allow the patient to provide full and informed consent (even if the doctor's own reading of the medical literature leads him to hold a different opinion about those risks), and (2) a law requiring a medical center to inform all clients, no matter the reason for their visit, how they can go *elsewhere* to obtain medical procedures that the center doesn't offer, won't offer, and are morally opposed to offering or facilitating.

A decision in favor of Petitioners in this case would therefore not disturb lower court decisions that have upheld state abortion-related informed consent provisions. *See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc). The statutes in those cases, unlike the Act, directly related to a particular patient being informed about the realities and consequences of a specific procedure *offered by the physician* that was being considered by the client. In *Rounds*, the law required "the performing physician to provide certain information to the patient as part of obtaining informed consent prior to an abortion procedure." 530 F.3d at 726. In *Lakey*, the law required "the physician 'who is to perform an abortion' to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure." 667 F.3d at 573.

In addition, businesses that offer abortion-related surgery or medication do so as part of a commercial transaction. Laws that impact their free speech rights (including compelled speech) are therefore subject to a lower level of First Amendment scrutiny than *amici*, who provide pregnancy-related services free of charge and pursuant to their non-commercial, religious, and social mission. *Compare In re Primus*, 436 U.S. 412 (1978) (invalidating state anti-solicitation rule as applied to an ACLU attorney) *with Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding state anti-solicitation rule as applied to a lawyer seeking clients injured in an auto accident); *also compare Riley* (canvassing for a cause) *with United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (*ban* on certain commercial advertising in certain locales).

Even an abortionist who practices his trade as a "charity," pursuant to non-commercial, ideological values, would still be subject to malpractice liability and ethics board review if informed consent is not obtained. In addition to common law, state laws such as those challenged in *Rounds* and *Lakey* define the substance of informed consent in the abortion context and the manner in which that consent is to be delivered. As this Court has said:

> [Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of violence against innocent human life; and, depending on

> one's beliefs, for the life or potential life that is aborted.

Casey, 505 U.S. at 852. Here, however, the Act cannot be justified as ensuring "informed consent" for a procedure that the compelled speakers *do not provide* and, in fact, morally object to providing.

IV. The Act Cannot Survive Judicial Scrutiny.

It is well-settled that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (citations omitted). In other words, it is *not* the burden of Petitioners in this case to demonstrate that the Act *fails* judicial scrutiny.

The law is clear: "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-42 (1994). Such laws must satisfy strict scrutiny. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (laws that are content or viewpoint-based "must satisfy strict scrutiny") (citing *Playboy*, 529 U.S. at 813 (2000)). In fact, they "are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818.

Strict scrutiny is a "searching examination," *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013), and is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To survive such a rigorous standard, the government must

demonstrate that the challenged law is "the least restrictive means of achieving a compelling state interest." *McCullen*, 134 S. Ct. at 2530.

The Act fails this exacting test.

A. No compelling governmental interest

The State bears the heavy burden of demonstrating that the Act is one of the "rare" instances in which a law mandating or directly regulating speech meets strict scrutiny's "demanding standard." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). This Court has described a compelling state interest as a "high degree of necessity," *id.* at 804, and of "the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be *actually necessary* to the solution." *Brown*, 564 U.S. at 799 (citations omitted) (emphasis added). Indeed, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Collins*, 323 U.S. at 530.

Accordingly, the "[m]ere speculation of harm does not constitute a compelling state interest," *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980), and the simple invocation of "public health" as a compelling interest, without more, is insufficient to meet the demands of strict scrutiny. *See Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1220 (D.C. Cir. 2013) ("'safeguarding the public health' is such a capacious formula that it requires close scrutiny of the asserted harm."). In other

words, the government has the burden of compiling a compelling evidentiary record in order to justify the regulation of speech as a means to combat a threat to public health. If mere invocation of "public health" were to suffice, strict scrutiny would be toothless.

The Act's stated purpose is "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Assem. Bill No. 775 § 2. Merely enhancing awareness of government programs—absent some dire, immediate public health crisis like a plague—is not a compelling interest that warrants the sort of treatment reserved for the most critical of government concerns. *See Brown*, 564 U.S. at 804-05 ("Even where the protection of children is the object, the constitutional limits on governmental action apply."); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (national security "cannot be invoked as a talismanic incantation to support any [law]").

In *Riley*, the government asserted a need for potential donors to a charity to be fully informed about how the money they donate is spent. 487 U.S. at 798. But this Court recognized that providing such information was not compelling enough an interest to override the First Amendment. To illustrate this point, the Court observed:

> we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the

> foregoing factual information *might be relevant to the listener* . . . a law compelling its disclosure *would clearly and substantially burden the protected speech.*

Id. at 798 (emphasis added); *see also Tornillo*, 418 U.S. at 248 (a governmental interest in ensuring that "a wide variety of views reach the public" was not substantial enough to justify a "right to reply" statute). There is no reason to think that the result in *Riley* would have been different if the law required fundraisers to notify their audience about state programs that serve the blind and, therefore, do not require donor support.

Moreover, the State's proffered interests suffer from a host of flaws that render them less than "compelling." First, they are speculative: the assertion that "thousands of women remain unaware of the public programs" advertised by the Act's message does not *prove* a harm to the public health, much less a harm so significant as to generate a *compelling* governmental interest. In addition, the government cannot simply *assume* that women are truly harmed by not being aware of free or low-cost access to family planning services. "[B]ecause [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Brown*, 564 U.S. at 799-800 (citation omitted). Indeed, public knowledge of these public programs does not necessarily mean that every potentially eligible woman will avail herself of those programs, let alone that doing so would actually advance her health. *See id.* at 803, n.9 ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

Second, there is a mismatch between the supposed problem and the State's remedy: there is no compelling proof that the targets of the Act, *i.e.*, pro-life pregnancy centers, are the cause of the alleged "widespread unawareness" harm posited by the Act, or that compelling the speech of these facilities will eliminate that alleged harm. For the government to meet its high burden of proof under strict scrutiny, it "must present more than anecdote and supposition." *Playboy*, 529 U.S. at 822.

Finally, if the Act's interests were truly compelling, and the ignorance of women regarding the public programs so widespread, there is no reason not to apply the Act's speech mandate to *every* licensed medical professional that offers pregnancy-related services, and not just to a small group of non-exempt facilities. The under-inclusiveness of the Act in this regard "undermines the likelihood of a genuine [governmental] interest." *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *see also Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1105 (2009) ("The statute's discriminatory purpose is further evidenced by its substantial . . . underinclusiveness with respect to the State's asserted interest in passing the legislation.").[20]

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[20] The command of the Act is not to prohibit false or misleading speech, but to make regulated centers speak a government message promoting, *inter alia*, state-funded abortions. Thus, even if *allegations* of deceptive practices by some pregnancy centers helped motivate passage of the Act, the Act itself does not pinpoint this problem as something to be remedied. Non-exempt licensed covered facilities must comply with the Act whether or not they engage in deceptive practices or have engaged in such practices in the past.

B. Not the least restrictive means

Under strict scrutiny, the government must also show that it has adopted the least restrictive means of advancing its alleged interests. That is no easy task. *See Hobby Lobby*, 134 S. Ct. at 2780 ("The least-restrictive-means standard is exceptionally demanding.") (citation omitted). Here, there can be little doubt that the State has not chosen the least restrictive means of furthering its goal of making citizens aware of government family planning programs.

One obvious way the State could advance its goals, without forcing pro-life centers to advertise government programs contrary to their religious mission, values, and purposes, is for the State to disseminate the message *itself*. *See Riley*, 487 U.S. at 800 ("[T]he State [could] itself publish the detailed financial disclosure forms it requires professional fundraisers to file."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance .... [E]ducational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective."); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 97 (1977) (suggesting that a municipality, as an alternative to speech restrictions, "continue 'the process of education' it has already begun" through municipality-sponsored speech targeted at raising awareness of its views on the local housing market).

California can communicate its message through a variety of media: radio and television spots, social media and government internet sites, billboards, notices placed in printed publications, brochures in state and local governmental offices, and so forth. The State has at its disposal a plethora of means to communicate its own message without having to conscript pro-life centers to speak its message for it. *See Sorrell*, 564 U.S. at 575, 578 (noting that "the State offer[ed] no explanation why remedies other than content-based rules would be inadequate" where it "can express [its] view through its own speech"); *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

If some women in California are truly ignorant of the State's pregnancy-related programs, then the fault lies principally with the state agencies that administer these programs. The State can remedy that perceived problem by raising and better allocating resources to advertise those programs itself, without having to compel the speech of anyone, let alone dissenting voices.

Even under the narrow-tailoring requirement of *intermediate* scrutiny, the State must show that "it seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 134 S. Ct. at 2539 (applying intermediate scrutiny to abortion buffer zone law). Nothing in the Act's findings or history, however, suggests that the State was required to compel the speech of pro-life centers

because other, more narrowly tailored, efforts have failed. *See Sorrell*, 564 U.S. at 575 ("[T]he State offers no explanation why remedies other than content-based rules would be inadequate."). As this Court has explained: "[i]f the First Amendment means anything, it means that regulation of speech must be a last—not first resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson. v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Even still, when "vital First Amendment interests [are] at stake, it is not enough . . . simply to say that other approaches have not worked." *McCullen*, 134 S. Ct. at 2540.

While the State might view the Act's blanket compulsion of speech as an efficient means of furthering its interests, such prophylactic measures cannot, by definition, constitute the least restrictive means of advancing the government's purpose: "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. That insistence has since been repeated: "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen*, 134 S. Ct. at 2535-36 (quoting *Riley*). Indeed, the "prime objective of the First Amendment is not efficiency." *Id.* at 2540.

A "prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (plurality opinion). When the government imposes requirements to speak a state-mandated

message in order to address a perceived problem, the First Amendment requires a scalpel, not a sledge hammer. *See id.* at 477-78 ("A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech.").

In sum, the most appropriate means for the State to further its purported interests is for the State to advertise *its own* programs, advising women of those programs before they have the need to visit a pregnancy-related center in the first place. The State has no greater authority to coerce pro-life centers to advertise its government programs than pro-life centers have to force the State to advertise their pro-life mission, values, and activities. The First Amendment ensures that, although the State of California (and other government entities) can participate in the marketplace of ideas as a speaker, the State cannot broadly wield its regulatory power, backed by the threat of penalties, to conscript private individuals and entities into advertising government programs against their conscience.

CONCLUSION

For the foregoing reasons, the Act's compelled speech requirement imposed upon licensed covered facilities violates the Free Speech Clause of the First Amendment. This Court should reverse.

Respectfully submitted,

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